United States Court of Appeals

for the

District of Columbia Circuit

TRANSCRIPT OF RECORD

UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 21,508

245

JAMES E. EPPS

Appellant,

v

UNITED STATES OF AMERICA,

Appellee.

Appeal from the United States District Court for the District of Columbia

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BRIEF FOR APPELLANT

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Counsel for Appellant.

STATEMENT OF QUESTIONS PRESENTED

The case involves an alleged operation of a hall room type of lottery.

Counts 1 and 3 charge operation of a lottery and maintaining a gaming premise continuously from August 13, 1965 to September 13, 1965.

Count 2 charges of sale of a lottery slip on August 13, 1965.

Count 4 charges possession of numbers slips on September 13, 1965.

The alleged sale set forth in count two is the only evidence of any activity as early as August 13, 1965, and alone supports the charge of continuous operation from August to September.

One Guillery, police officer was the sole witness to any event of August 13, 1965. On direct examination, he stated that August 13, 1965 was the day in question; on identification of an official police form prepared under his direction he makes the date June 13, 1965; and on redirect permitted the prosecutor to again elicit the date as August 13, 1965. He further testified he went to defendant's alleged apartment with an unknown negro male he had met about an hour previously in a nearby saloon; that he did not know the man's name, and this person was not summoned by the prosecution. As to count 3 - maintaining gaming premises - this officer is the sole support for the government's case as to August 13, 1965.

The question presented as to Guillory's testimony is this:

Do his testimonial inaccuracies - the uncertainty as to June or August; his testimonial inability to recall anything about his companion; his testimonial alacrity in agreeing with the prosecutor's lead-conclusion-questioning - fail to constitute credible evidence establishing guilt beyond a reasonable doubt?

The testimony of the prosecution tended to prove that on September 13, 1965, police present to execute an arrest warrant, entered the premises and took from defendant a book he was attempting to conceal in the kitchen and that on this occasion an unknown female person handed a paper to defendant with the observation "Here are your slips".

There was testimony that pursuant to search warrant police entered the premises and found gambling paraphernalia on August 29, 1965. No person was present at that time save the officers.

This was the testimony offered in support of the indictment - corroborative of witness Guillory.

The defendant denied the government testimony in toto.

Defendant called a witness, one Billy Vines who testified she rented the entire premises involved; that during the period August 13, 1965 to September 13, 1965, defendant did not reside in the premises; and that approximately 5 persons other than herself - roomers and her daughter - had absolute

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to use and occupy not only their separate sleeping quarters but the rest of the house as well.

The question presented by this phase of the case is:

Could paraphernalia seized in the premises and not from the defendant be used as evidence against him to show that he was operating the premises and maintaining the premises from August 13, 1965 to September 13, 1965.

Would paraphernalia found in the premises - in places open to the use of many persons - some of which was seized when he was absent successfully serve to support the presumption arising from possession, per statute, when the alleged possession is patently not exclusive; and uncontradicted, on credible testimony stated he had neither dominion nor control over the premises?

Was it error to refuse to grant defendant's motion for a severance under Rule 14 under the facts of the case?

INDEX

CASES CITED

STATUTES

RULES OF COURT

UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 21,508

JAMES E. EPPS

Appellant,

v

UNITED STATES OF AMERICA,

Appellee.

BRIEF FOR APPELLANT

JURISDICTIONAL STATEMENT

The jurisdiction of this Court is invoked under the terms of Title 28, Section 1291, U.S.C.

STATEMENT OF THE CASE

The appellant was indicted in the United States District Court for the District of Columbia on charges of Promoting a Lottery contrary to D.C. Code 22-1501, during the period August 13, 1955 to September 13, 1955.

On Count two a violation of the same statute charged with having sold a chance on a lottery on August 13, 1955.

On Count three the violation of D.C. Code 22-1505 by maintaining a gambling premise continuously from August 13, 1955 to September 13, 1955.

On Count four is a violation of Title 22-1502 on a charge of possession of lottery tickets on September 13, 1955.

In support of its case the United States called, among others, one Wilfred Guillory, a member of the Metropolitan police Department during the period herein involved who testified substantially as follows:

That on August 13, 1955, acting pursuant to official instructions he went to 1402 Harvard Street N. W., and knocked on the door of what the officer described as "Epps' Apartment"; that he was accompanied by an unknown male whom he had met shortly theretofore; that he knocked on the apartment door and was admitted by Epps; that while in the apaatment he observed Epps take a numbers bet from a person to the officer unknown and himself made a numbers bet with Epps.

The testimony of this officer was not corroborated and he did not obtain any receipt for his alleged bet.

As a means of refreshing his recollection this witness referred to a document identified as P.D, Form 163, which he testified was typewritten by a fellow officer at his dictation.

On cross-examination at Tr.37 the Officer states that the form 163 which had been used to refresh was made to the best of his recollection on the "6th month 13 date of 65" on a date some 30 days after as his testimony on direct examination. On recross-examination the District Attorney was able to ellicit from this witness a restatement that the events under inquiry occurred August 13, and not June 13. In addition on cross-examination (Tr.43) he stated that he had no idea of the identity of the negro male who accompanied him, but that he met him in a bar a couple of hours before he went to the premises (tr.50).

A witness, Marcellus B. Taylor, and a member of the Metropolitan Police Department, testified that he executed a search warrant authorizing search of the premises concerned; that a detective Howard was with him on August 29, 1965. On that date when the Officers arrived at the premises and announced their identity and mission there was no response and the officers moved from the premises a small quantity of liquor some numbers slips and some been. No person was present.

This witness testified that on September 13, 1965, he and Officer Howard returned to the premises for the purpose of executing an arrest warrant and were admitted to the apart-

ment by a female later identified as Billie Vines. His testimony further stated that Epps, this time present, was prevented from leaving the premises and a note book was taken from him which was alleged to reflect numbers business; the Officer further testified that an unidentified female entered the premises at that time and stated: "Mr. Epps, here are your numbers." And Officer Taylor took from her a paper upon which were written several numbers and also obtained a book from Epps which contained numbers. This Officer testified that he was not present at the premises on August 13, 1965.

The defendant called the aforementioned Billie Vines who testified that during the period August 1965 to September 13, 1965, she resided in 1402 Harvard Street N. W. and she had four tenants each and every having free access to the kitchen, living room, and telephone in addition to the use of their own sleeping quarters; that the tenants had the privilege of bringing in guests and frequently did so; that she was personally absent from the premises during forenoons when she worked as a cook, and from 5 P.M. to 2 A.M. when she worked at another job; that Epps did not reside there during the period August 13, to September 13, 1965, the premises being occupied by herself, her daughter, and roomer named Billy Washington, and while Epps came by to see her on occasion he did not live at 1402 Harvard Street.

The defendant Epps testified in his own behalf stating that he was not present on August 29, 1965, when the apartment

was searched and that the matters alleged by Officer Guillory to have happened on August 13, 1965, actually occurred on June 13 or July 13, 1965; that he did not know Officer Guillory and had had no dealings with him at any time (tr.190,191; and on cross examination stated (tr.198) that he lived at 1402 Harvard Street in June or July; that he was not living at 1402 at the time of his arrest and denied residing there in August and September.

Prior to commencing the actual trial of the case it was by the [illegible] Court without a jury the defendant below alleged that there was an improper and prejudicial joinder of counts and asked that the prosecution be required to elect, which motion was by the Court denied.

section, possession of any record, notation, receipt, ticket, certificate, bill, slip, token, paper, or writing shall be presumed to be knowing possession thereof. (Mar.3,1903;, ch.354,§ 353a as added Apr. 6, 1933, 52 Stat. 193. ch 72,§2, and amended June 29, 1953, 67 Stat. 95, ch. 159 §203(a).)

§22-1503. Gambling premises - Definition - Prohibition against maintaining - Forfeiture - Liens - Deposit of moneys in Treasury - Penalty - Subsequent.

* * *

(b) It shall be unlawful for any person in the District of Columbia knowingly, as owner, lessee, agent, employee, operator, occupant, or otherwise, to maintain or aid or permit the maintaining of any gambling premises.

RULES OF COURT

Rule 14 Relief from Prejudicial Joinder

If it appears that a defendant or the government is prejudiced by a joinder of offenses or of defendants in an indictment or information or by such joinder for trial together, the court may order an election or separate trials of counts grant a severance of defendants or provide whatever other relief justice requires

STATEMENT OF POINTS

1. THE DENIAL OF APPELLANT'S MOTION TO OBTAIN RELIEF FROM THE IMPROPER AND PREJUDICIAL JOINDER OF COUNTS.

2. IN RULING THAT THE TESTIMONY AND EVIDENCE ADDUCED AMOUNTED TO EVIDENCE SUFFICIENT TO CALL INTO PLAY THE INFERENCE OF A PRIMA FACIE CASE SET FORTH IN THE STATUTE THE COURT COMMITTED SUBSTANTIAL AND PREJUDICIAL ERROR.

STATUTES INVOLVED

D. C. Code, 1931 Edition:

§22-1501. Lotteries - Promotion - Sale or possession of tickets.

> If any person sahll within the District keep, set up, or promote, or be concerned as owner, agent, or clerk, or in any other manner, in managing, carrying on, promoting, or advertising, directly or indirectly, any policy lottery, policy shop, or any lottery, or shall sell or transfer any chance, right, or interest, tangible or intangible, in any policy lottery, or any lottery or shall sell or transfer any ticket, certificate, bill,token, or other device, purpoting or intended to guarantee or assure to any person or entitle him to a chance of drawing or obtaining a prize to be drawn in any lottery, or in a game or device, commonly known as policy lottery or policy or shall, for himself or another person sell or transfer, or have in his possession for the purpose of sale or transfer, a chance or ticket in or share of a ticket in any lottery or any such bill, certificate,token, or other device, he shall be fined upon conviction of each said offense not more than $1,000 or be imprisoned not more than three years, or both.The possession of any copy or record of any such, right, or interest, or of any such ticket, certificate.bill, token, or other device shall be primafacie evidence that the possessor of such copy or record did, at the time and place of such possession, keep, set up, or promote, or was at such time and place concerned as owner, agent, or clerk, or otherwise in managing, carrying on, promoting, or advertising a policy lottery, policy shop, or lottery.

§22-1502. Possession of lottery or policy tickets.

> If any person shall, within the District of Columbia, knowingly have in his possession or under his control, any record, notation, receipt, ticket, certificate, bill, slip, token, paper, or writing, current or not current used or to be used in violating the provisions of section 22-1501, 22-1504, or 22-1503, he shall upon conviction of each such offense, be fined not more than $1,000 or be imprisoned fornot more than one year, or both. For the purpose of this

SUMMARY OF ARGUMENT

1. The first claim of the appeal rests upon his allegation that it was contrary to law to bring the totality of alleged violations in one indictment and to try them together.

Even though the case was tried by the Court without a jury it appears to appellant that where there is a substantial period of time existing between acts alleged to be criminal; where different criminal acts are charged and where different persons are concernad the probability of prejudicial confusion arising in the mind of the trier of fact overweights the desirability of obliging the prosecution, and the applicable cases and rule of Court forbid such a presentation.

2. Where, as here, a prima facie case is made against the defendant through the mere possession of what is known as numbers slips applicable law does not permit the finding of such a case unless the possession established is proved beyond a reasonable doubt to be exclusive in the defendant.

ARGUMENT

In his statement of the case the appellant has detailed as much of the testimony as he believed the matter requires and will not repeat it her, but as to a continuous criminal act alleged to have commenced on August 13, 1965, there was but one police witness. He testified originally that he made certain observations on August 13, 1965, when he met Epps in the aparment involved; he then contradicted his testimony

to state that a written memorandum made under his direction showed the event to have occurred June 13, 1965, and later again stated the date was August 13, 1965. The appellant stated that he was not in the premises August 13, 1965, and a defense witness, Lessee of the apartment concerned, testified that Epps did not occupy any part of the premises on August 13, 1965, the appellant argues that it ;is contrary to established procedure to permit that quantity and quality of testimony and evidence to stand as judicially approved proof beyond a reasonable doubt. It was certainly confusing and underscores the evaluation attendant upon this insistence to proceed with multi count indictments.

This Court has condemned the procedure in Drew v. United States, 331 F 2 d. 85, 113, U.S. App. D.C,11,14 as follows:

> (3,4) The justification for a liberal rule on joinder of offenses appears to be the economy of a single trial. The argument against joinder is that the defendant may be prejudiced for one or more of the following: (1) he may become embarrassed or con founded, in presenting separate defenses; the jury may use the evidence of one of the crimes charged to infer a criminal disposition on the past of the defendant from which is found his guilt of the other crime or crimes charged; or (3) the jury may cumulate the evidence of the various crimes charged and find guilt when if considered separately it would not so find. A less tangible, but perhaps equally persuasive element of prejudice may reside in a latent feeling of hostility engendered by the charging of several crimes as distince from only one.
> * * *
> (5) It is a principle of long standing in our law that evidence of one crime is inadmissable to prove disposition to commit crime from which the jury may infer that the defendant committed the crime charged. Since the likelihood that juries

will make such an improper inference is high, courts presume jrejudice and exclude evidence of other crimes unless that evidence can be admitted for some substantial legitimate purpose. The same dangers appear to exist when two crimes are joined for trial, and the same principles of prophylaxis are applicable.

* * *

(12) p.20 * * * If separate crimes are to be tried together, and we are not to be understood as intimating any conclusion that this can never. as a practical matter, be successfully undertaken - both court and counsel must recognize that they are assuming a difficult the performance of which calls for a vigilant precision in speech and action far beyond that required in the ordinary trial.

AS TO POSSESSION

In connection with the evidenciary effect of the articles seized by the Police firstly is when they searched the premises under authority of a warrant and found no one present, and secondly when they searched the premises after they had gained entrance to serve an arrest warrant. The defendant denied the articles seized were his or belonged to him and claimed that he was not an occupant of the premises with the status of roomer on either occasion and the Lessee corroborated that testimony.

So the legal effect of the statutory inference arising from possession becomes important. A New Jersey case which persuasivly presents the appellant's claim is State v. Labato, _____N.J. _____ 30 A 2d. 317, 322 is as follows:

[13] "Possession" is an ambiguous term derived from theRoman law. It has variant connotations; but on well-settled principle the word is to be given a strict construction in statutes defining criminal and penal offenses. it signifies an

intentional control and dominion. Bergedorff v United States, 10 Cir., 37 F.2d 243 (1929). Animus possidendi is of the essence of possession. Such was its primary meaning under Roman law. "Possession is the occupation of anything with the intention of exercising the rights of ownership in respect to it." Hunter, Rom.Law 203. Under the cited statutes, "possession" imports "corporeal possession in fact * * * The elements of this possession are: First, the mental attitude of the claimant, the intent to possess, to appropriate to oneself; and second, the effective realization of this attitude. Effective realization involves the relation of the claimant to other persons, amounting to a security for their noninterference, and the relation of the claimant to the material thing itself, amounting to a security for exclusive use at will. All the authorities agree that an intent to exclude others must coexist with the external facts, and must be fulfilled in the external physical facts, in order to constitute possession. It is this requirement which prevents prevents the man in whose building or automobile, or traveling bag, or pocket, liquor is found, which was surreptitiously placed there by another, from being a violator of the law." Citing numerous State cases.

Where beyond the mere fact that certain articles alleged to be contraband were found in the premises involved on dates alleged in the indictment, and these being widely separated there is really no required proof of possession in the appellant for the statutory inference will not operate against a defendant who was one of numerous persons in whom possession may have existed. Nor does the word "may" weaken his situation because the proof must show exclusive possession in him and must exclude the possession of all others.

In short, to the mind of the appellant the case presents a classic example of a procedural delight with respect to the prosecution of alleged crimes, i. e. multiplicity of counts; reliance upon vague and uncertain testimony and

evidence to establish multiple counts and tactical determination to include as many alternative charges of crime as the facts may or may not support with the expectation that a multiple count indictment will certainly result in conviction for something

Part of the onus thus placed upon a defendant arises from the very human reaction to a multiplicity of counts for it is no exageration to state that the average trier of facts will tend to regard a defendant in a multiple count indictment as being guilty of some of the crimes ex necessitae.

CONCLUSION

The appellant requesta a favorable action of the Court upon his appeal for the reason that however culpable his conduct may be a conviction should not bear the taint of procedure which does not measure up to a fair trial under due process of law.

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CERTIFICATE OF SERVICE

I certify that on this 30th day of September, 1968 I personally deposited copy of the foregoing brief in the office of the United States Attorney for the District of Columbia, 3rd floor, U. S. District Courthouse Building, Washington, D. C., 20001.

T. Emmett McKenzie

INDEX

TABLE OF CASES

OTHER REFERENCES

* Cases chiefly relied upon are marked with asterisks.

QUESTIONS PRESENTED *

I. Was there sufficient evidence from which the trial court could have concluded beyond a reasonable doubt that appellant was guilty of the crimes charged?

II. Did the trial court abuse its discretion when it denied appellant's motion for severance?

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* This case has not been previously presented to this Court under same or similar title.

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 21,508

JAMES E. EPPS, APPELLANT

v.

UNITED STATES OF AMERICA, APPELLEE

Appeal from the United States District Court for the District of Columbia

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BRIEF FOR APPELLEE

COUNTERSTATEMENT OF THE CASE

A four count indictment filed on February 24, 1966, charged appellant with the operation of a lottery and the sale of lottery tickets (22 D.C. Code § 1501), with maintaining gambling premises (22 D.C. Code § 1505), and with the possession of number slips (22 D.C. Code § 1502).[1] Appellant was tried by the court without a jury

[1] The indictment read as follows:

FIRST COUNT:

Continuously during the period from about August 13, 1965, to about September 13, 1965, within the District of Columbia, James E. Epps was concerned as owner, agent and clerk, and

on June 8 and 14, 1967, Judge Gasch presiding, and found guilty as charged. He was sentenced on October 6, 1967 to imprisonment for a term of one to three years on the first count and for a term of one year on each of the succeeding counts, the sentences to run concurrently. Notice of this appeal was filed on October 9, 1967.

A. The Government's Case

The government's case was established primarily through the testimony of the Police Officers involved in the investigation and ultimate arrest of appellant. Officer Wilford Guillory, called first by the government, described the circumstance of his encounter with appellant on August 13, 1965 (Tr. 20-21). Officer Guillory testified that his assignment that evening was to investigate the second floor premises at 1402 Harvard Street, Northwest, in connection with prior investigative information concerning the operation of an illegal numbers type of lottery by appellant at that address (Tr. 21-23, 52-53, 56). That night, at approximately 11:15 P.M., Officer Guillory, ac-

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in other manners, in managing, carrying on and promoting a lottery known as the numbers game.

SECOND COUNT:

On or about August 13, 1965, within the District of Columbia, James E. Epps sold and transferred to Wilford Guillory a chance, right and interest in a lottery known as the numbers game.

THIRD COUNT:

Continuously during the period from about August 13, 1965, to about September 13, 1965, within the District of Columbia, James E. Epps did knowingly, as lessee, agent, operator and occupant, maintain, aid and permit the maintaining of a gambling premises located at 1402 Harvard Street, Northwest, Second Floor.

FOURTH COUNT:

On or about September 13, 1965, within the District of Columbia, James E. Epps, knowingly had in his possession and under his control, notations, records, receipts, tickets, certificates, bills, slips, tokens, papers and writings, current and not current, used and to be used in a lottery known as the numbers game.

companied by another unidentified individual, went incognito to the suspected apartment and knocked on the door (Tr. 21-23, 45-51, 68-69). The door was opened by appellant, who was positively identified by Officer Guillory at trial, and they entered the apartment (Tr. 22-23).

There were other people already in the apartment at that time and Officer Guillory noticed one of them transfer 25 cents to appellant, who placed the money in his pocket, and play a number with him (Tr. 24-25, 32-34). Appellant recorded this number play on a yellow pad of paper and placed it in the desk drawer where he was sitting (Tr. 33-34). Shortly thereafter, Officer Guillory approached appellant and also requested to play a certain number (Tr. 24-25). He passed a dollar bill, pre-marked and supplied by the Metropolitan Police Force for that specific purpose, to appellant, who accepted and placed it in his pocket and recorded the selected number, 416, on a yellow pad of paper drawn from and replaced in the same desk drawer (Tr. 25, 29-33). The witness also related that he purchased a bottle of gin from appellant on that same occasion (Tr. 51-54, 67).

Having accomplished his investigatory objective, Officer Guillory left the premises and returned to his private automobile where he made notes of the foregoing events (Tr. 34, 60-64). These notes and information were subsequently turned over to his superior, Officer Taylor, and provided, in part, grounds for the eventual search of those premises on August 29, 1965, and appellant's arrest there on September 13, 1965 (Tr. 41, 57-63).

The next witness on behalf of the government was Police Officer Marcellus B. Taylor, who conducted a search of the suspected premises on August 29, 1965 and also participated in appellant's arrest there on September 13, 1965 (Tr. 70, 89). Officer Taylor testified that prior to that search, and in the course of his investigation of those premises for suspected vice activity, he had personally observed appellant leaving and entering that residence on numerous occasions and at various times "around the clock" (Tr. 87-89).

On the night of August 29, 1965 Officer Taylor and his partner, Detective Howard, went to the cited premises to execute a search warrant based on accumulated information involving illegal vice activity (Tr. 71, 99, 109). The officers knocked at the door and announced themselves, and upon receiving no response from within, entered (Tr. 71, 99). They found no one present in the apartment, but, as a result of their ensuing search, discovered and seized a large quantity of numbers slips and other lottery paraphernalia and some liquor. (Tr. 72-74, 100, 109-110). The seized materials relating to the numbers lottery activity were found in the drawer of a small desk, in a vase located on the surface of that desk, and in a cabinet to the left of the entrance door of the apartment (Tr. 79, 81). Each of the items was initialed by the officers, placed in a bag at the premises, and listed on the return of the search warrant (Tr. 74). They were introduced into evidence collectively, at trial, as Government Exhibit # 1 (Tr. 73, 120, 124-125). Also seized on that occasion and identified as part of Government Exhibit # 1 was one of appellant's personal papers, a certificate recognizing his penal release for good time (Tr. 84-86).

Officer Taylor, whose expertise in the numbers field was expressly stipulated by appellant's counsel, identified each item in that exhibit, which included, in numbers parlance, cut cards,[2] Sneaky Peat,[3] and a 1½ inch thick bundle of writer's pads[4] with number designations totaling $966.16 in amount of plays. He also explained the function of each item in the total scheme of the numbers operation and in the context of the relevant racket organization. (Tr. 72-81, 84, 106-107). Officer Taylor's

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[2] These are cards printed so that the player will know which numbers are cut, in other words, what the odds are or how much money he will receive in case he has a hit (Tr. 75).

[3] This is a card listing the statistics of what the winning numbers were in the past years (Tr. 79).

[4] This item is actually self-explanatory, being a recordation of numbers plays called into the writer and for his own personal use (Tr. 80).

opinion, as an expert, was that these various materials represented numbers paraphernalia and were used by a "writer" in the operation of a numbers lottery (Tr. 81-83).

Officer Taylor also conducted the arrest of appellant on September 13, 1965 (Tr. 89, 109-110). On that date, he and Detective Howard returned to the same premises with a warrant for appellant's arrest (Tr. 89). They knocked at the door and were admitted into the apartment by a woman, later identified as Mrs. Billy Mae Vines (Tr. 90). Immediately upon their entry the officers noticed appellant, who was carrying a notebook in his hand, scampering into the kitchen, where he was followed by them and observed attempting to conceal the notebook in a space between two cabinets (Tr. 90-94). This notebook, which contained a large quantity of numbers transactions, was seized from appellant's person by the arresting officers (Tr. 91, 93, 105-106). Additional number slips were also discovered in appellant's wallet and removed from his person incident to his arrest (Tr. 91-92, 94-95, 106).

Almost immediately following that incident, another woman, identified as Ida Mae Blaylock, entered the apartment and, holding out a slip of paper, said to appellant, "Mr. Epps, here are your numbers," to which appellant replied "Be quiet, the police are here" (Tr. 91-92, 96-98). Officer Taylor apprehended this piece of paper, which contained various numbers notations, from the woman and further testified that they also discovered a large quantity of number slips lodged in the same vase and desk table described in the preceeding testimony (Tr. 91-92, 95). Numbers slips were also found in a pocketbook belonging to Mrs. Billy Mae Vines (Tr. 91-92, 94-95, 106).

Again, Officer Taylor explained the exact nature of each item with respect to the lottery operation and concluded, as an expert, that all of these items, which were collectively identified and submitted into evidence as Government Exhibit # 2, were items used by a writer in connection with a numbers type of lottery operation (Tr. 86, 93-99, 120-121, 124-125).

The final government witness was Detective John J. Howard (Tr. 209). Detective Howard informed the court that he was present and assisted Officer Taylor on September 13, 1965, at the time of appellant's arrest (Tr. 210). When the officers first gained entry to the premises on that occasion Detective Howard distinctly remembered seeing appellant, who was holding a tablet or notebook in his left hand, run into the kitchen (Tr. 210). Detective Howard followed appellant and recovered this notebook, which was being placed between two of the kitchen cabinets (Tr. 210). He positively identified this notebook as one of the items constituting Government Exhibit # 2. (Tr. 211). The remainder of the materials comprising that Exhibit were likewise identified by Detective Howard, with special emphasis on those number cards seized from appellant's wallet incident to his arrest (Tr. 211-216). This concluded the government's case.

B. The Case for the Defense

The first witness called for the defense was Mrs. Billy Mae Vines, appellant's acknowledged common-law wife (Tr. 126, 150-151, 180). Mrs. Vines indicated that between August 13, 1965 and September 13, 1965 she resided at 1402 Harvard Street, Northwest, and described that premises as a three story commercial building and advised that she rented the entire living premises and subleased it to other tenants except for her own living quarters (Tr. 151-152, 157, 159, 182). Mrs. Vines further explained that on the ground or street level there was a bar, that she occupied the premises on the second floor along with her ten year old daughter and a tenant, whose name she thought was Billy Washington, and the third floor area was leased to two girls and two other occupants (Tr. 151-152, 159-162, 165-166). All of these tenants, she related, had access to the entire living premises, including her own living area (Tr. 153-154).

Mrs. Vines testified that at no time during the specific period about which she was being questioned was appellant living at these premises (Tr. 157-158, 166, 180, 187).

However, sometime prior to that time, after appellant had been released from prison, and at the present time, appellant was living with her, as her common-law husband (Tr. 180-182). Actually, there was a time, perhaps in July, 1965, when appellant was residing in her apartment at 1402 Harvard Street, but she "asked the Police Department to put him out of my house because (she) caught him in number ten, and asked him to take all his clothes and move" (Tr. 182, 187-188). At other times, specifically, during the questioned time period, appellant did occasionally come by to visit her there and was, in fact, present when the police arrived and arrested them on September 13, 1965 (Tr. 152-153, 160, 164, 167, 180). Mrs. Vines' explanation for the men's clothing, present in a chest in her section of the premises on that date, was that they belonged to her brother, not appellant (Tr. 184-185). Moreover, Mrs. Vines denied having supplied the police officers with information concerning appellant's address, which appeared as 1402 Harvard Street, Northwest, in a notation on the affidavit in support of the warrant for appellant's arrest. This appendage was dated August 31, 1965 (Tr. 185-187).

With respect to the arrest affair itself, Mrs. Vines stated that both she and appellant were present in her designated area of the premises when the police arrived on September 13, 1965 (Tr. 152-153, 160, 164, 167). She remembered opening the apartment door to let the officers in and then going into the bathroom (Tr. 168-170). According to the witness, appellant was standing in the vicinity of the living room-dining area of the apartment at that time (Tr. 169-171). There was also another woman present, but Mrs. Vines did not recognize her name (Mrs. Ida Mae Blaylock) and could not recall whether or not this woman had entered the apartment before or after the police officers (Tr. 164, 167-170). Mrs. Vines also claimed that she never heard this woman say "Epps, here are your numbers", or appellant respond, "Ida, these are the police" or any other words to that effect (Tr. 167-169). Similarly, she did not see the officers seize any

numbers slips from this other woman (Tr. 177). However, Mrs. Vines did assert that her inability to supply complete information in this regard might be attributed to the fact that she was still in the bathroom when some of those events actually transpired (Tr. 168-169).

While Mrs. Vines could not recall appellant doing anything specific when the police first entered the apartment, she definitely did not see him run into the kitchen (Tr. 171, 173-174). She did not remember appellant having anything in his hands at that instant and assured that she had never previously seen the notebook contained in Government Exhibit # 2, but she did "see Officer Howard or Taylor, they went in the kitchen and took a book of some kind out of the kitchen" (Tr. 171-173).

Mrs. Vines was not exactly sure as to whether appellant was searched on the premises or not (Tr. 174). She did notice the officers remove some money from appellant's pocket along with his wallet, without specifically searching it (Tr. 174-175). When shown the remainder of the articles in Government Exhibit # 2, including the numbers paraphernalia allegedly taken from her own pocketbook, Mrs. Vines professed no knowledge of them whatsoever or even if her pocket book was present in the apartment at that time (Tr. 175-177). Mrs. Vines further related that at the time of arrest the officers did not search any desk or vase or anywhere else other than their activity in the kitchen and added that she had no knowledge of anything concerning numbers materials in her apartment (Tr. 177, 182-184).

With respect to the night of August 13, 1965, when Officer Guillory allegedly visited the premises, she could neither recall the officer, nor remember any such time when she was present there, with appellant and others, that whiskey was served and numbers played (Tr. 178). However, she was aware of the fact that on August 29, 1965, while she was absent from the premises, her apartment was searched (Tr. 178-179). When exhibited the numbers paraphernalia contained in Government Exhibit # 1, Mrs. Vines remarked that she had never seen any

of these materials in her apartment, and that if they were found there, anyone could have left them (Tr. 179). The only item of evidence she did recognize was appellant's personal paper that certified his release from prison for good time (Tr. 179-180). The presence of that document in her apartment was explained by the fact that appellant had received it when he had just gotten out of prison, in 1963, and "I was living at another address and he was living as a common-law husband of mine there" (Tr. 179-180). It was then brought to the witness' attention, by the prosecuting attorney, that the date on the face of the certificate was January 4, 1965 (Tr. 180-181).

Appellant concluded his defense by taking the stand (Tr. 189). When qeustioned concerning the incident at 1402 Harvard Street on August 13, 1965, appellant replied that "This poor guy got a sale of half a pint or something like that, June 13th or July 13. It wasn't August 13th" (Tr. 189-191, 199). He then advised, however, that he could not recall to whom this liquor sale had been made and insisted that he did not sell a number lottery to that same person, or anyone else, that night (Tr. 190-191, 196-198). In fact, he said that he did not sell numbers at all (Tr. 194, 197). Appellant did acknowledge that at the time of the alleged liquor sale event, which he reiterated was in June or July of 1965, he was living at the involved premises, common law, with Mrs. Vines (Tr. 198-199, 209).

Pertaining to the search of that premise on August 29, 1965, appellant testified that he was not present at the apartment on that date, that the numbers materials uncovered did not belong to him, and that the presence of his release certificate at that location could be explained by the possibility that he left some of his personal papers there (Tr. 199-200). Appellant did confirm his presence at that address in September of 1965, at which time he was searched and arrested by Officers Taylor and Howard (Tr. 193-194, 200). In describing that event appellant stated that he was standing in the area between the living room and the kitchen when the police first entered

the premises and that he never went into the kitchen after they arrived (Tr. 203-204). Appellant's testimony was that he was searched by Officer Taylor while he was in the living room area of the apartment but that he did not have any type of numbers book in his possession (Tr. 194, 203). He stated that the only items seized from him at that time were two small cards, taken from his wallet, and $64 in cash from his pocket (Tr. 194-195, 207-208). Appellant admitted that these two cards contained certain numbers notations but explained that although he was not positive, they did not appear to be in his own writing and their existence could be explained by the fact that he occasionally played the numbers and these were merely records of his own plays (Tr. 207-208). Moreover, appellant claimed no knowledge, familiarity or possession, at any time, with the remainder of the numbers paraphernalia contained in Government Exhibits # 1 and # 2 and completely denied the charges as set out in the indictment (Tr. 194-195, 199, 203-205). In addition, he asserted that at the time of his arrest he was not living at the questioned premises, although he visited there occasionally, and added that he rented a room during the critical period at 2723 13th Street, Northwest (Tr. 195, 205-207).

Appellant testified that his common-law wife, Mrs. Vines, and another lady were also present on the occasion of his arrest (Tr. 200-201). According to appellant, Mrs. Vines was not searched on the premises and he had no recollection of anything taken from her pocketbook at that time (Tr. 203-204). He did not know the name of the other woman but he did remember that she entered the premises, carrying a slip of paper, shortly after the police had arrived (Tr. 201-202). Appellant did not hear her say "Epps, here are your numbers", nor did he respond "Ida, these are the police" (Tr. 201-203). In fact, he knew nothing concerning the slip of paper she carried and since Officer Taylor took it away from her, he thought it must have been something for Officer Taylor (Tr. 201-202).

STATUTES AND RULES INVOLVED

Title 22, District of Columbia Code, Section 1501, provides:

> If any person shall within the District keep, set up, or promote, or be concerned as owner, agent, or clerk, or in any other manner, in managing, carrying on, promoting, or advertising, directly or indirectly, any policy lottery, policy shop, or any lottery, or shall sell or transfer any chance, right, or interest, tangible or intangible, in any policy lottery or any lottery or shall sell or transfer any ticket, certificate, bill, token, or other device, purporting or intended to guarantee or assure to any person or entitle him to a chance of drawing or obtaining a prize to be drawn in any lottery, or in a game or device commonly known as policy lottery or policy or shall, for himself or another person, sell or transfer, or have in his possession for the purpose of sale or transfer, a chance or ticket in or share of a ticket in any lottery or any such bill, certificate, token, or other device, he shall be fined upon conviction of each said offense not more than $1,000 or be imprisoned not more than three years, or both. The possession of any copy or record of any such chance, right, or interest, or of any such ticket, certificate, bill, token, or other device shall be prima-facie evidence that the possessor of such copy or record did, at the time and place of such possession, keep, set up, or promote, or was at such time and place concerned as owner, agent, or clerk, or otherwise in managing, carrying on, promoting, or advertising a policy lottery, policy shop, or lottery.

Title 22, District of Columbia Code, Section 1502, provides:

> If any person shall, within the District of Columbia, knowingly have in his possession or under his control, any record, notation, receipt, ticket, certificate, bill, slip, token, paper, or writing, current or not current used or to be used in violating the provi-

> sions of section 22-1501, 22-1504, or 22-1508, he shall, upon conviction of each such offense, be fined not more than $1,000 or be imprisoned for not more than one year, or both. For the purpose of this section, possession of any record, notation, receipt, ticket, certificate, bill, slip, token, paper, or writing shall be presumed to be knowing possession thereof.

Title 22, District of Columbia Code, Section 1505, provides, in pertinent part:

> (a) Any house, building, vessel, shed, booth, shelter, vehicle, enclosure, room, lot, or other premises in the District of Columbia, used or to be used in violating the provisions of section 22-1501 or 22-1504, shall be deemed "gambling premises" for the purpose of this section.
>
> (b) It shall be unlawful for any person in the District of Columbia knowingly, as owner, lessee, agent, employee, operator, occupant, or otherwise, to maintain or aid or permit the maintaining of any gambling premises.

Rule 8(a) of the Federal Rules of Criminal Procedure provides:

> Two or more offenses may be charged in the same indictment or information in a separate count for each offense if the offenses charged, whether felonies or misdemeanors or both, are of the same or similar character or are based on the same act or transaction or on two or more acts or transactions connected together or constituting parts of a common scheme or plan.

Rule 14 of the Federal Rules of Criminal Procedure provides:

> If it appears that a defendant or the government is prejudiced by a joinder of offenses or of defendants in an indictment or information or by such joinder for trial together, the court may order an election or separate trials of counts, grant a severance of defendants or provide whatever other relief justice re-

quires. In ruling on a motion by a defendant for severance the court may order the attorney for the government to deliver to the court for inspection *in camera* any statements or confessions made by the defendants which the government intends to introduce in evidence at the trial.

SUMMARY OF ARGUMENT

I. The trial judge properly denied appellant's motion for judgment of acquittal. Viewed in its customary favorable light, the government's evidence established that appellant sold and possessed numbers paraphernalia on August 13 and September 13, 1965, and that he continuously operated a lottery during that period. The record reflects that Officer Guillory personally observed and participated in a numbers lottery operated by appellant and purchased a number play with him on August 13, 1965 at the suspected premises. A search of those premises on August 29, 1965, while the occupants were absent, revealed an extensive amount of paraphernalia used in the operation of a numbers type of lottery and, among those materials, one of appellant's personal papers. Furthermore, on September 13, 1965, the date of appellant's arrest, the arresting officers observed him attempting to conceal numbers cards in the kitchen area of the suspected premises. These items, along with additional amounts of numbers paraphernalia found in appellant's wallet and in a variety of other familiar receptacles in the apartment, were seized by the officers and described as indicia reflecting the operation of a numbers lottery. On that same occasion, the officers also observed Mrs. Ida Mae Blaylock enter the apartment and, being unaware of the officers presence, tender appellant a packet of numbers slips stating, "Mr. Epps, here are your numbers."

Moreover, since all of these activities were ineluctably associated with the premises at 1402 Harvard Street, Northwest, it is perfectly clear that this evidence was also sufficient to satisfy proof beyond a reasonable doubt that appellant was in the immediate control of the sus-

pected premises during the period that the lottery was in progress and that he maintained it for that purpose.

II. The trial court properly denied appellant's motion to sever. Where, as here, the same series of transactions gave rise to the charges, the proof offered by the government presented no unusual difficulties or complexities that might have tended to confuse the trial judge in ascertaining the evidence relating to each charge and the language of the applicable statutes expressly contemplated joinder of offenses, there was no abuse of discretion in denying appellant's request for severance pursuant to Rule 14, F. R. Cr. P.

ARGUMENT

I. There was ample evidence from which the trial court could conclude beyond a reasonable doubt that appellant was guilty of the crimes charged.

(Tr. 20-25, 29-34, 68-69, 72-100, 105-107, 109-110, 120-121, 124-216)

Appellant contends generally that there was insufficient evidence of his participation in the stated crimes from which the trial judge could have found beyond a reasonable doubt that he was guilty, Appellant's Br. 8-9; he urges, therefore, that his motion for judgment of acquittal at the close of the government's case should have been granted (Tr. 150). We think appellant's argument is without merit.

In reviewing the sufficiency of the government's evidence this Court on appeal, like the trial court on a motion for judgment of acquittal, "must assume the truth of the Government's evidence and give the Government the benefit of all legitimate inferences to be drawn therefrom" in determining whether reasonable persons might or might not find guilt beyond a reasonable doubt. *Curley* v. *United States*, 81 U.S. App. D.C. 389, 160 F. 2d 229, cert. denied, 331 U.S. 837 (1947); *Crawford* v. *United States*, 126 U.S. App. D.C. 156, 375 F. 2d 332 (1967). And, under settled principles, an appellate court must

normally accept the testimony of witnesses heard, observed and credited by the trial court. *Glasser* v. *United States*, 315 U.S. 60, 80 (1942); *Jackson* v. *United States*, 122 U.S. App. D.C. 324, 328, 353 F. 2d 862, 866 (1965).

Guided by these standards we examine, in brief, the government's evidence. The government claims that appellant's guilt is proved, as to all charges, by activities related to an apartment at 1402 Harvard Street, Northwest, which he is purported to have maintained as gambling premises. To establish its case, the government relied upon the evidence gathered by the Metropolitan Police on three separate occasions, between August 13, 1965 and September 13, 1965. Officer Wilford Guillory testified that on August 13, 1965, pursuant to knowledge acquired through previous surveillance, he visited the stated premises, incognito, to investigate the operation of a numbers lottery by appellant (Tr. 20-23, 45-53, 56, 68-69). He was admitted into the apartment by appellant and, while there, observed another person transact a number play with appellant and then, using pre-marked collateral supplied by the Metropolitan Police Department, he also placed a number lottery with appellant (Tr. 22-25, 29-34). In both cases, appellant recorded the designated number play on a yellow pad and filed the same in a desk drawer (Tr. 24-25, 29-33). Having completed this investigative mission, Officer Guillory left the premises and subsequently reported these observations to his superior, Officer Marcellus B. Taylor (Tr. 34, 45, 57-64).

Officer Taylor testified that in the course of his own investigation of the same premises, for suspected vice activity, he had personally observed appellant enter and leave the premises, on many occasions, and at various times of the day and night (Tr. 87-89). On August 29, 1965, after procuring a search warrant, he and Detective Howard, finding the occupants absent, entered the stated premises pursuant to the warrant and discovered and seized an extensive amount of numbers and lottery type paraphernalia, together with a certificate bearing appellant's name and acknowledging his penal release for serv-

ice of good time (Tr. 71-74, 84-86, 99-100, 109-110). These various materials were discovered in the drawer of a small desk, in a vase situated on the surface of that desk, and in a cabinet to the left of the entrance door (Tr. 73-74, 79, 81, 124-215). The seized items, excluding the referenced certificate, were described by Officer Taylor, as an expert, as paraphernalia used by a numbers writer in the operation of a lottery (Tr. 72-84, 106-107).

Officer Taylor also testified that he returned to the same premises, with Detective Howard, on September 13, 1965, armed with a warrant for appellant's arrest (Tr. 89, 109-110). When the officers entered the apartment, they saw appellant retreat to the kitchen and attempt to conceal a notebook, that he was carrying, in a space between two cabinets (Tr. 90-94). Appellant was immediately apprehended and the notebook, which contained an array of numbers transactions, was seized from his person (Tr. 91, 93, 105-106). Other numbers slips were discovered and removed from appellant's wallet, when he was searched incident to his arrest (Tr. 91-92, 94-95, 106). Also, on that occasion, a woman, who entered the apartment holding out a slip of paper containing numbers designations, summoned appellant, "Mr. Epps, here are you numbers"; to which appellant replied "Be quiet, the police are here" (Tr. 91-92, 96-98). In addition to the foregoing items, the officers also uncovered numbers slips lodged in the same vase and desk drawer described in the previous incidents, and in a pocketbook belonging to the appellant's common-law wife, Mrs. Billy Mae Vines, who was the registered occupant of the premises and also present on the date of that event (Tr. 91-92, 94-95, 106).

Officer Taylor, again, explained the precise nature of each item seized during the last incident and opined that they were being used by a writer in connection with a numbers type of lottery operation (Tr. 86, 93-99, 120-121, 124-125). Detective Howard concluded the government's case by corroborating, in detail, the preceding testimony and the circumstances surrounding appellant's arrest (Tr. 209-216).

Indeed, it is perfectly clear from this evidence that on two separate occasions, August 13, 1965 and September 13, 1965, appellant was personally observed by three different police officers while in possession of numbers slips. On the former occasion appellant also sold a number play to Officer Guillory; and, on the latter date, similar paraphernalia were actually seized from his person. These facts are not only direct and abundant proof of the charges embodied in counts two (sale of a numbers lottery) and four (possession of lottery tickets) of the indictment, but they also engender the statutory presumption, as set out in 22 D.C. Code § 1501, that appellant was concurrently involved in the operation of a numbers lottery.[5]

This prima facie case of the "operation" charge (count one) is further buttressed by the evidentiary record. It reflects that on August 13, 1965 Officer Guillory observed and participated in a numbers lottery operated by appellant in the suspected premises. A search of that apart-

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[5] Appellant's contention that "the mere fact that certain articles alleged to be contraband were found in the premises involved on dates alleged in the indictment, and these being widely separated there is really no required proof of possesion in the appellant for the statutory inference will not operate against a defendant who was one of numerous persons in whom possession may have existed" is entirely misplaced. Appellant's Br. 11. First, it should be made perfectly clear, that the prima facie presumption of operation arose strictly from proof that appellant, *himself*, was in actual possession of numbers slips. Secondly, the relevant statute says no more than that as part of the proof of operation the government shall be entitled to an inference in its favor that possession of numbers slips shall be prima facie evidence that *the possessor* "at the time and place of such possession" did operate a lottery (22 D.C. Code § 1501). It does not undertake to define possession in terms of "place" as appellant seems to suggest, but merely denotes the locus of the crime of "operation". Moreover, such possession, like every other element in the case, must be proved beyond a reasonable doubt and, it was clearly within the province of the trial judge to take into account the permitted inference as it considered its verdict on the charge of operation. See *Maynard* v. *United States*, 94 U.S. App. D.C. 347, 215 F.2d 336 (1954); *Bates* v. *United States*, 95 U.S. App. D.C. 57, 219 F.2d 30 (1955); *Davis* v. *United States*, 107 U.S. App. D.C. 76, 274 F.2d 585 (1959), cert. denied, *sub nom Ellis* v. *United States*, 363 U.S. 806 (1960).

ment, on August 29, 1965 revealed a plethora of numbers paraphernalia that the participating officers, as experts, described as being used in the operation of a numbers lottery. Although neither appellant, nor any other occupant, was present on that occasion, it is nevertheless significant that present among the lottery materials seized by the officers was one of appellant's personal papers. Furthermore, on September 13, 1965, when the same officers revisited the suspected premises to execute the warrant for appellant's arrest, they again seized, from familiar receptacles, large quantities of numbers paraphernalia that were described as being used in the operation of a numbers type lottery. As in the first incident, appellant was present in the premises at that time, along with his common-law wife, Mrs. Billy Mae Vines, and another woman, Mrs. Ida Mae Blaylock, who arrived at the apartment shortly after the officers and was intercepted while attempting to deliver numbers slips to appellant. This evidence overwhelmingly demonstates that appellant was in continuous operation of a lottery between August 13, 1965, and September 13, 1965. See *Maynard* v. *United States, supra.*

Under these circumstances reasonable men could also infer that appellant was maintaining "a gambling premises at 1402 Harvard Street, Northwest, Second Floor" as provided in count three of the indictment. Here, it is not necessary to show exclusive possession in appellant and exclude the possession of all others, or that he be in permanent possession of the premises, or that he be a lessee, or even a keeper of the same. It is only incumbent to show that he was in charge, possession, or control of the premises when the offense in fact occurred. *Sesso* v. *United States,* 77 U.S. App. D.C. 35, 133 F. 2d 381 (1942).

As previously indicated, the record discloses that appellant was present on two of the three visitations to that premises by the police. In the first instance he answered the door and was subsequently observed by Officer Guillory while conducting the lottery operation. Similarly, on

the occasion of his arrest, he was found in the premises carrying a large quantity of numbers paraphernalia. On that same occasion he was addressed, by a woman who arrived at the apartment to deliver numbers slips, as the object of her business there. Moreover, the fact that one of his personal papers was seized by the police on another date, when there was no one present at the premises, together with extensive lottery materials, further establishes his intimate connection with, and gambling status of, the suspected premises. Thus, appellant's presence, and indicia of presence, at the suspected premises on these critical dates, the dominion and authority he asserted therein, his position and conduct during the police visits, as reflected in the respective officers' testimony, is, we submit, sufficient evidence from which the trial judge concluded beyond a reasonable doubt that appellant was at least in the immediate control of the premises during the period that the lottery was in progress and maintained it for that specific purpose. *Sesso* v. *United States, supra; Maynard* v. *United States, supra; Wyche* v. *United States*, 90 U.S. App. D.C. 67, 193 F. 2d 703, cert. denied, 342 U.S. 943 (1951).

The only evidence offered to undermine the strength of the government's case was the testimony of appellant and his acknowledged common-law wife, Mrs. Billy Mae Vines. Overall, their combined testimony was a total contradiction of the government's evidence. (Tr. 126-202). Based on that testimonial refutation and a bold conclusionary assault on the veracity of the government's testimony, appellant asserts that "it is contrary to established procedure to permit that quantity and quality of testimony and evidence to stand as judicially approved proof beyond a reasonable doubt." Appellant's Br. 9. Even assuming, *arguendo*, that the testimony was as appellant suggests, appellant has done nothing but focused on questions the resolution of which are, in the instant case, within the exclusive domain of the trial judge. *Glasser* v. *United States, supra; Jackson* v. *United States, supra; Trimble* v. *United States*, 125 U.S. App. D.C. 173, 369 F. 2d 950

(1966); *Harris* v. *United States*, 118 U.S. App. D.C. 21, 331 F. 2d 95 (1963); *Young* v. *United States*, 114 U.S. App. D.C. 42, 43, 309 F. 2d 662, 663 (1962); *Wigfall* v. *United States*, 97 U.S. App. D.C. 252, 253, 230 F. 2d 220, 221 (1956). Here, after evaluating the demeanor of the witnesses and the substance of their testimony, the trial judge found appellant guilty as charged.

II. The trial court did not abuse its discretion when it denied appellant's motion for severance.

(Tr. 4-16)

Prior to the commencement of trial appellant argued to the trial court that there was an improper and prejudicial joinder of counts and requested that the prosecution be required to elect (Tr. 4-16). That motion was denied (Tr. 16). Without elaboration and virtually no relevant legal authority, appellant resurrects that demand in this appeal. Appellant's Br. 7, 9-10. This assignment of error is untenable.

Joinder of offense is permissible under Rule 8(a), F. R. Cr. P., in situations where, as here, the various charges are similar in nature. Nevertheless, if a timely motion is made under Rule 14, F. R. Cr. P., and prejudice is shown, the court should either order an election by the government or grant separate trials. However, it is well established that motions under Rule 14 are addressed to the sound judicial discretion of the trial judge, and exercise of that discretion will be set aside only for clear abuse thereof. *Barnes* v. *United States*, 127 U.S. App. D.C. 95, 381 F.2d 263 (1967); *Brown* v. *United States*, 126 U.S. App. D.C. 134, 375 F. 2d 310 (1966), cert. denied, 388 U.S. 915 (1967); *Cupo* v. *United States*, 123 U.S. App. D.C. 324, 328, 359 F. 2d 990, 994 (1966); *United States* v. *Bentvena*, 319 F. 2d 916, 931-932 (C.A. 2), cert. denied, *sub nom Mirra* v. *United States*, 375 U.S. 940 (1963); *Robinson* v. *United States*, 93 U.S. App. D.C. 347, 210 F. 2d 29 (1954); *Maynard* v. *United States*, *supra*.

The trial transcript vividly illustrates that Judge Gasch gave full and complete consideration to appellant's motion for severance and denied it only after each side had an extensive opportunity to state its case (Tr. 4-16). In arriving at that determination the trial court properly recognized that the various charges were intimately related and grew out of the same series of designated transactions. Furthermore, the very nature of the charge of "continuous operation" of a lottery between August 13, 1965 and September 13, 1965, suggests the utilization of proof of every probative incident between these dates, which were obviously included in the proof of the other related charges. It is also noteworthy, that under the circumstances of this case, joinder is actually contemplated by the statutory language which provides that the possession of numbers lottery paraphernalia is prima facie evidence that the possessor of the same is operating a lottery (22 D.C. Code § 1501) and, that any premises used in violating the provisions of section 22-1501 shall be deemed a "gambling premises" (22 D.C. Code § 1505 (a)). Finally, all of the activities encompassed by the charges of "possession", "sale" and "operation" occurred at 1402 Harvard Street, Northwest, and are relevant ingredients in proving that that establishment was being maintained by appellant as a gambling premise (22 D.C. Code § 1505). It follows, therefore, that the government's evidence would have been essentially the same, and properly admissible, in a separate trial for each specific offense. And, as indicated in appellant's brief, his defense to all of these alleged activities was exactly the same. Appellant's Br. 9-10. See, *Allen* v. *United States*, 91 U.S. App. D.C. 197, 202 F. 2d 329, cert. denied, 344 U.S. 869 (1952).

Moreover, the government's production of evidence, presented through three witnesses, was brief, clear and without complexity or confusion. It cannot seriously be said, in these circumstances, that the trial judge, as fact finder, could have possibly been confused by the evidence or misused it. See, *Gray* v. *United States*, 123 U.S. App. D.C.

39, 356 F. 2d 792 (1966); *Daly* v. *United States*, 119 U.S. App. D.C. 353, 342 F. 2d 932 (1964), cert. denied, 382 U.S. 853 (1965); *Chambers* v. *United States*, 112 U.S. App. D.C. 240, 301 F.2d 564 (1962); *Langford* v. *United States*, 106 U.S. App. D.C. 21, 268 F. 2d 896 (1959); *Dunaway* v. *United States*, 92 U.S. App. D.C. 299, 205 F. 2d 23 (1953). Compare, *Gregory* v. *United States*, 125 U.S. App. D.C. 140, 369 F. 2d 185 (1966); *Drew* v. *United States*, 118 U.S. App. D.C. 11, 331 F. 2d 85 (1964).

Accordingly, we submit that appellant's claim of prejudice is based upon pure conjecture and the court's ruling denying appellant's motion for severance is unassailable.

CONCLUSION

WHEREFORE, it is respectfully submitted that the judgment of the district court should be affirmed.

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